91-415

Supreme Court, U.S.
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No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

ALAN GREGORY M.L.V. WONDERWHEEL
AND JOHN R. WEBER,

PETITIONERS,

V.

MENDOCINO COUNTY SUPERIOR COURT,
CALIFORNIA FIRST APPELLATE DISTRICT,
TIMOTHY O. STOEN, VELDA G. BRADY,
ARTHUR L. BECKTOLD, AND JOSEPH BECKTOLD,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

(1) What are the requirements of the Due Process Clause of the Fourteenth Amendment when there is reason to doubt that an attorney-written decision represents the trial court judge's own considered conclusions, and how should the "clearly erroneous" standard be applied by the reviewing court to insure the Due Process Rights of litigants in such a case?

(2) May claimants "reasonably and in good faith" complain in federal court, under 42 U.S.C § 1983, that their Fourteenth Amendment Due Process Rights were violated in the conduct of a prior state court case when:

(a) the claimants filed three petitions for a hearing of their Due Process claims in the prior state action, which petitions were denied without comment, and the claims remain unheard; and,

(b) the claims are based upon

the following factual assertions: (i) the state trial court Statement of Decision was written by the prevailing attorney; (ii) the trial court judge signed the attorney-written Statement of Decision with the sole change that the word "Proposed" was lined out of the title; (iii) there are numerous reasons to believe that the attorney-written Statement of Decision did not represent the judge's own considered conclusions; and, (iv) the state appellate court judges applied a less stringent standard of review to the attorney-written Statement of Decision than would have been called for even if the trial court judge had written it himself?

(3) On a Rule 12(b)(6) motion to dismiss before the reception of any evidence in the case may the federal courts decide factual issues contrary to factual assertions in the complaint?

(4) Is the service of copies of three

petitions in a state court case raising the Fourteenth Amendment claims set forth in Question 2., above, on the attorney for the prevailing parties in the state court case notice to those parties and their attorney of the constitutional claims against them?

(5) Is the filing of a Petition for Rehearing submitted directly to state appellate court judges raising Fourteenth Amendment claims against those judges' standard of review in a state court case notice to the judges of the constitutional claims against them?

(6) Are claimants "legally prevented" by established abstention doctrines and principles of federalism and comity from filing parallel claims in federal court under § 1983 against state court judges and parties to a state court case while the appeals raising those claims are still pending in the state court case?

PARTIES

In addition to the Respondents shown in the caption to the case[1], the following Respondents should be included since they are named as Defendants, in their official capacities[2], in the First Amended Complaint: MENDOCINO COUNTY SUPERIOR COURT JUDGE ARTHUR A. BROADDUS, retired; MENDOCINO COUNTY SUPERIOR COURT JUDGE CONRAD COX, who replaced JUDGE BROADDUS; MENDOCINO COUNTY RECORDER MARSHA A. YOUNG; and CALIFORNIA FIRST APPELLATE DISTRICT JUDGES NEWSOM, ELKINGTON and HOLMDAHL.[3]

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[1] The MENDOCINO COUNTY SUPERIOR COURT and the CALIFORNIA FIRST APPELLATE DISTRICT are named as Defendants in the original Complaint but not named as Defendants in the First Amended Complaint.

[2] "Of course a State official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the state.' [Citations omitted.]" *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304, 2311 n.10 (1989).

[3] Action against these parties was stayed by the District Court pending the outcome of the appeal. District Court Status Conference Order filed October 9, 1990.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1991

ALAN GREGORY M.L.V. WONDERWHEEL
and JOHN R. WEBER,

Petitioners,

v.

MENDOCINO COUNTY SUPERIOR COURT;
CALIFORNIA FIRST APPELLATE DISTRICT;
TIMOTHY O. STOEN; VELDA G. BRADY;
ARTHUR L. BECKTOLD; and JOSEPH BECKTOLD,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners ALAN GREGORY M.L.V. WONDERWHEEL ("GREGORY WONDERWHEEL") and JOHN R. WEBER ("Petitioners") respectfully pray that a Writ of *Certiorari* issue to review the decision of the United States Court of

Appeals for the Ninth Circuit entered in this proceeding on May 30, 1991 (rehearing denied on July 19, 1991), affirming the District Court Orders, filed on July 30, 1990 and August 1, 1990, dismissing claims against the MENDOCINO COUNTY SUPERIOR COURT ("SUPERIOR COURT"), the CALIFORNIA FIRST APPELLATE DISTRICT ("CALIFORNIA APPELLATE COURT"), TIMOTHY O. STOEN, VELDA G. BRADY, ARTHUR L. BECKTOLD, and JOSEPH BECKTOLD ("PRIVATE PARTIES"), on statute of limitations grounds.

OPINIONS BELOW

The unpublished Order of the Ninth Circuit Court filed July 19, 1991, denying rehearing, is set out at p. A-2 of the Appendix.

The unpublished Memorandum of the Ninth Circuit Court filed May 30, 1991, is set out at pp. A-3 to A-7 of the Appendix.

The District Court Status Conference Order filed October 9, 1990, staying action

on the Amended Complaint, is set out at pp. A-8 to A-10 of the Appendix.

The District Court Order filed August 1,1990, dismissing the claims against the PRIVATE PARTIES, is set out at pp. A-11 to A-13 of the Appendix.

The District Court Order filed July 31, 1990, dismissing the claims against the SUPERIOR COURT and the CALIFORNIA APPELLATE COURT, is set out at pp. A-14 to A-24 of the Appendix.

JURISDICTION

The unpublished Memorandum of the Ninth Circuit Court was filed on May 30, 1991. A timely petition for rehearing was filed on June 12, 1991, and denied on July 19, 1991. Jurisdiction of this Court is invoked under 28 U.S.C.S. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional and statutory provisions involved in this case are set out verbatim in the Appendix; those provisions

are: Section 1 of the Fourteenth Amendment, Title 42 U.S.C §§ 1983 and 1988, Federal Rules of Civil Procedure, Rules 12(b)(6) and 52, California Codes of Civil Procedure §§ 632 and 909, and California Rules of Court, Rule 23.

STATEMENT OF THE CASE

Petitioners' original Complaint was filed in the U.S. District Court for the Northern District of California, under 42 U.S.C. § 1983, on April 2, 1990.

Our First Amended Complaint was filed in the District Court on July 23, 1990. While the First Amended Complaint is somewhat shorter, the claims and facts asserted in both Complaints are essentially the same. Therefore, Petitioners will refer to our First Amended Complaint in this Petition unless otherwise noted.

Petitioners' § 1983 claims are that JOSEPH BECKTOLD, his brother, ARTHUR BECKTOLD, their aunt, VELDA BRADY, and their

attorney, TIMOTHY STOEN, (the "PRIVATE PARTIES") conspired[4] to deprive Petitioners of our Fourteenth Amendment rights to due process in a California court action they brought against us in 1985 for partition by sale of 40 acres of undeveloped land in Willits, California; and that SUPERIOR COURT JUDGE BROADDUS, who heard the case, and the CALIFORNIA APPELLATE JUDGES, who reviewed it, acted jointly[5] with the PRIVATE PARTIES, under color of California law, to deprive Petitioners of our Due Pro-

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[4] "To be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy. [Citation omitted.]" *United Steelworkers of America v. Phelps Dodge*, 865 F.2d 435, 436 (9th Cir. 1983).

[5] "[T]here is 'state action' whenever the 'State has so far insinuated itself into a position of interdependence [with the otherwise 'private' person whose conduct is said to violate the Fourteenth Amendment] * * * that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.' [Citation omitted.]" *United States v. Price*, 86 S.Ct. 1152, 1157 n.7 (1966).

cess Rights guaranteed by the Fourteenth Amendment, in that California case.[6]

I. Factual Assertions.

A detailed presentation of the factual basis for our claims is provided here because the central lower court decision we ask this Court to review is that our claims are "unreasonable" and brought in "arguable good faith." Petitioners believe it is necessary to understand the substance of our claims in order to properly judge of our "reasonableness" and "good faith" in bringing them to federal court.

A. The PRIVATE PARTIES - Conspiracy.

Petitioners' claims against the PRIVATE PARTIES are based upon, but not lim-

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[6] *Brady, et.al. v. Weber, et.al.*, Mendocino County Superior Court No. 50813, Judgment October 21, 1986, *affirmed on appeal; opinion not reported*, Court of Appeal of the State of California, First Appellate District, Division One, No. A037353, filed August 17, 1988; *rehearing denied without opinion*, September 16, 1988; *review denied without opinion*, California Supreme Court, November 9, 1988; *cert. denied without opinion*, U.S. Supreme Court docket No. 88-1320, April 3, 1989.

ited to, the following factual assertions:

(1) Pursuant to California Code of Civil Procedure § 632, attorney TIMOTHY O. STOEN submitted a "Proposed" Statement of Decision which was signed by the trial court judge with the single change that the word "Proposed" was lined out of the title. TIMOTHY STOEN's name and address appear in the upper left-hand corner of page one of the document.

(2) The crucial finding in the attorney-written Statement of Decision varies considerably from the judge's Tentative Decision of the case, i.e., the Tentative Decision found the interests in the disputed property to be 1/2 to ARTHUR BECKTOLD and 1/2 to GREGORY WONDERWHEEL, while the Statement of Decision found the interests to be 3/4 to ARTHUR BECKTOLD, 1/6 to GREGORY WONDERWHEEL, and 1/12 to JOHN WEBER.

(3) The attorney-written Statement of Decision is a largely repetitive 27 page

document, argumentative throughout, consisting primarily of restatements of attorney TIMOTHY STOEN's trial brief.

(4) The attorney-written Statement of Decision contains numerous material false statements of the record, e.g., that one of the central disputes at the trial was undisputed: "It is undisputed that VELDA G. BRADY paid (with ARTHUR BECKTOLD'S FUNDS) all of the $4,500" for the purchase of former partner ANNE KAYLOR's 1/2 interest in the property in 1977. (The parenthetical phrase is in the original text.) It was undisputed that VELDA BRADY never "paid" anything towards the propety with her own funds and that she did transmit $4,500 to ANNE KAYLOR. Whose funds she transmitted was hotly disputed.

(5) The attorney-written Statement of Decision contains fabrications of alleged "facts" not found in the record, e.g., that JOHN WEBER was "on welfare" at the time of

the deed to him from VELDA BRADY in 1979.

(6) The attorney-written Statement of Decision suppresses central documentary evidence in the record. None of the following documentary evidence is discussed anywhere in the Statement of Decision:

(a) GREGORY WONDERWHEEL's twenty-five original receipts, dated between February 27, 1975 and November 30, 1980, inclusive, totalling $4,135.50, from the real estate agent who received the payments on the note, WILDA WILSON, and matching carbon copies of WONDERWHEEL's cashier's checks for those payments.

(b) A xerox copy of the payment record book kept by real estate agent WILDA WILSON, covering the period from May 1972 through May 1979, showing the amounts credited to interest and principle, the descending principle balance, and, from July 1977 through May 1979, her entries of the names of the parties making the pay-

ments. (The record book also has GREGORY WONDERWHEEL's original margin notes showing who made the payments prior to July 1977, which notes he made at the time purchase of ANNE KAYLOR's 1/2 interest.) The record book is in exact agreement with WONDERWHEEL's original receipts and with Petitioners' testimony and contradicts the testimony of the BECKTOLDS.

(c) GREGORY WONDERWHEEL's original receipts from the Mendocino County Tax Collector (for $1,014) for a delinquent property tax bill which ARTHUR BECKTOLD claimed he had paid;

(d) a letter from JOSEPH BECKTOLD to GREGORY WONDERWHEEL, written before the 1977 sale of former land partner ANNE KAYLOR's 1/2 interest in the property, stating JOSEPH BECKTOLD's belief that there were restrictions on the sale of her interest.

(7) The attorney-written Statement of

Decision suppresses the entire testimony of former land partner ANNE KAYLOR, who was not a party to the California lawsuit, including her testimony:

(a) that she was paid $4,500 for her 1/2 interest by a check transmitted to her by VELDA BRADY;

(b) that she was unaware of any $2,000 indebtedness at the time of the sale (the Statement of Decision found that the sale price was $6,500, including the cancellation of a $2,000 indebtedness to ARTHUR BECKTOLD);

(c) that $4,500 was the amount she had paid toward her 1/2 interest in the property and included "no [equity], no interest, nothing" more;

(d) that there had been an oral fixed-price preemption agreement among the partners since before the property was purchased in 1972;

(e) that JOSEPH BECKTOLD told

her, when the land was purchased in 1972, that he would have his interest recorded in his aunt VELDA BRADY's name because he could not own property in his own name and VELDA BRADY handled his financial affairs because he "was on ATD" (Aid to the Totally Disabled);

(f) that she had never heard of ARTHUR BECKTOLD; and

(g) that JOSEPH BECKTOLD had angrily insisted she could not sell her 1/2 interest for "what the property was worth" because "if anybody left the property they were [supposed to] give their share back for what they put into it."

(8) For thirteen years (from the purchase of the property in May of 1972 until after the California Court action was filed by VELDA BRADY in May of 1985) JOSEPH BECKTOLD represented himself to Petitioners, to ANNE KAYLOR, and to VELDA BRADY, as the owner of the interest in the property re-

corded in VELDA BRADY's name. VELDA BRADY claimed in her original California complaint that the only "interests of record or actually known to her" were 1/3 each for herself, GREGORY WONDERWHEEL and JOHN WEBER (which claim was true except that VELDA BRADY believed she held her recorded interest in JOSEPH BECKTOLD's behalf). The PRIVATE PARTIES claimed in their Amended Complaint that VELDA BRADY was the recorded owner of 1/3 interest but claimed no interest in the property, that ARTHUR BECKTOLD was the "actual owner" of 3/4 interest in the property including the 1/3 interest recorded in VELDA BRADY's name, and that JOSEPH BECKTOLD had no interest in the property. (Petitioners asserted that GREGORY WONDERWHEEL and JOHN WEBER each paid for and rightly owned the 1/3 interests recorded in their respective names, and that JOSEPH BECKTOLD was the "real owner" of the 1/3 interest recorded in VELDA

BRADY's name.) VELDA BRADY quitclaimed her recorded interest to ARTHUR BECKTOLD after she filed her original complaint in the California partition action.

(9) JOSEPH and ARTHUR BECKTOLD testified at the trial that they had deceived both VELDA BRADY and Petitioners for thirteen years and that VELDA BRADY and was not informed of the alleged interest of ARTHUR BECKTOLD, recorded in her name, until after she filed her original complaint.

(10) The BECKTOLDS testified that JOSEPH BECKTOLD had been prohibited by a prior secret written agreement[7] with ARTHUR BECKTOLD from entering into any agreements restricting the sale price of the property and that, because of this obligation to his brother, JOSEPH BECKTOLD could not and did not enter an oral fixed price

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[7] A xerox copy of this agreement, dated January 6, 1971, more than one year before the purchase of the disputed property, which makes no reference to the disputed property, was submitted in evidence at the trial.

preemption agreement with Petitioners and ANNE KAYLOR. JOSEPH BECKTOLD denied knowledge or understanding of or responsibility for any agreements or transactions concerning the property and claimed that VELDA BRADY had been the "responsible" party.

(11) ARTHUR BECKTOLD testified at the trial that he never discussed the property with anyone but JOSEPH BECKTOLD; that he never met any of the other land partners; that he never visited the property until he travelled from his home in the Los Angeles area to Mendocino County to give his deposition in 1985; that he had been unaware of the contents of the deeds transferring interests in the property; that he was "pretty sure" he had given $4,500 in cash to JOSEPH BECKTOLD to give to VELDA BRADY to transmit to ANNE KAYLOR for the purchase of ANNE KAYLOR's 1/2 interest in the property; that he had "no receipt, no records whatsoever on the property"; and that VELDA

BRADY had been the "responsible" party.

(12) VELDA G. BRADY was not required to testify at the trial--in person, by deposition or interrogatories or otherwise--based upon attorney TIMOTHY STOEN's statements at a pre-trial hearing: (a) that her health prevented her from travelling from Southern California to the Mendocino County court, (b) that she claimed no interest in the property whatsoever and her interest in the property was "in name only", and (c) that she had "no relevant testimony to offer".

(13) The BECKTOLDS' testimony contained numerous material allegations concerning VELDA BRADY's knowledge, beliefs, intentions, actions, and responsibilities, which the Statement of Decision written by attorney TIMOTHY STOEN credited, e.g.:

(a) that VELDA BRADY personally transmitted more than $18,000, over thirteen years, for the downpayment, tax pay-

ments and payments on the note on the property[a] (including funds advanced to cover various alleged delinquencies of ANNE KAYLOR and Petitioners), for which payments the only documentary evidence submitted was eight canceled checks for post-1977 property taxes, totalling $1,619.57, which ARTHUR BECKTOLD admitted he "believed" Petitioners had contributed to, and one check for $1,400, dated January 13, 1982, "for "Joseph Becktold - land payment". The

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[a] The purchase price of the property in 1972 was $16,400. There was a $3,200 downpayment and a 10-year note for $13,200, at 7.0% interest, with monthly payments due of $151.00. The payments on the note were received and recorded by real estate agent WILDA WILSON for the original seller of the property. The total amount invested in the property for principle, interest, and property taxes by all the partners was approximately $25,584: $3,200 - downpayment; $18,456 - note payments; $3,928 - property taxes. (The $4,500 paid by ANNE KAYLOR is included these totals.) This accounting excludes the four rough hand-built cabins and a workshop the parties built on the property and the construction of a pond. JOSEPH BECKTOLD testified he paid $900 cash to the contractor who built the pond. JOHN WEBER submitted a letter by way of a receipt from the contractor, WAYNE WATERS, saying that he paid $900 cash to the contractor. The letter was admitted as hearsay evidence.

$18,000 plus was allegedly given to VELDA BRADY in cash by JOSEPH BECKTOLD who had, allegedly, been secretly given the cash by ARTHUR BECKTOLD.

(b) that VELDA BRADY did not receive any money from GREGORY WONDERWHEEL for transmittal to ANNE KAYLOR for the purchase of ANNE KAYLOR's 1/2 interest in the property (carbon copies of two cashier's checks from GREGORY WONDERWHEEL to VELDA BRADY, totalling $1,750, were submitted in evidence at the trial but were found "not reliable" in the Statement of Decision);

(c) that GREGORY WONDERWHEEL had prepared the 1977 deed from former land partner ANNE KAYLOR to "VELDA G. BRADY and ALAN GREGORY M.L.V. WONDERWHEEL" without VELDA BRADY's knowledge of its contents (the deed reads on its face: "WHEN FILED MAIL TO: VELDA G. BRADY", followed by her address, and shows that it was filed on

"Jul 8 3:07 PM '77"); and,

(d) that VELDA BRADY had been "induced" in 1979 by JOHN WEBER to sign a deed to himself for 1/3 of her recorded 1/2 interest by a "promise to pay". (*See* footnote 9, below.)

(14) JOSEPH BECKTOLD stole JOHN WEBER's receipts and documents concerning the property and those receipts and documents were in the possession of attorney TIMOTHY STOEN at the time of the trial. ARTHUR BECKTOLD testified at the trial and in his sworn pre-trial deposition that he had seen at least one of JOHN WEBER's stolen receipts "for $2,100"[9] at his attorney's office. One of JOHN WEBER's stolen documents was presented in evidence at the

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[9] JOHN WEBER testified he made a payment for $2,160 as his final pay-off of his 1/3 interest in the property before VELDA BRADY deeded 1/3 of her recorded interest to him. Real estate agent WILDA WILSON's record book shows $2,160 payment was made on April 16, 1979, with her entry of the name "WEBER" beside it. The deed from VELDA BRADY to JOHN WEBER was dated July 12, 1979, and recorded on July 17, 1979.

trial by attorney TIMOTHY STOEN.

B. JUDGE BROADDUS --Joint Action.

Petitioners' claims against SUPERIOR COURT JUDGE BROADDUS are based upon, but not limited to, the following factual assertions:

(1) JUDGE BROADDUS directed attorney TIMOTHY STOEN to "prepare any further pleadings as required" in his Tentative Decision.

(2) JUDGE BROADDUS signed the attorney-written Statement of Decision with the sole change that the word "Proposed" was lined out of the title.

C. CALIFORNIA APPELLATE JUDGES - Joint Action.

Petitioners' claims against the CALIFORNIA APPELLATE JUDGES are based upon, but not limited to, the following factual assertions:

(1) The CALIFORNIA APPELLATE JUDGES did not consider the fact that the SUPERIOR COURT Statement of Decision was written by

the prevailing attorney in their review of the case.[10]

(2) Petitioners, who are not lawyers and were acting *in pro per,* argued in our opening brief to the CALIFORNIA APPELLATE JUDGES that the Statement of Decision was "clearly erroneous" and that there was "no substantial evidence" to support the findings, and requested the CALIFORNIA APPELLATE JUDGES to make factual determinations, pursuant to California Rules of Court, Rule 23(a), and California Code of Civil Procedure § 909.[11]

(3) The CALIFORNIA APPELLATE JUDGES

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[10] This issue was not raised until after the appeal in a Petition for Rehearing. Petitioners, who were acting *in pro per*, were unaware of any legal grounds for raising it in the initial appeal, there being no California case law on the subject of attorney-written findings.

[11] The purpose of CCP § 909 "is to enable appellate courts, in appropriate cases, to terminate litigation by affirmance, or modification and affirmance, of the judgment, or by reversal with directions to enter judgment for appellant if it appears that on no reasonable theory could respondent make a further showing in the trial court." *People v. Benford*, 53 Cal.2d 1, 6 (1959)

did not read or consider Petitioners' briefs.

(a) The unpublished California Appellate Opinion states as follows:

> "[W]ithout citation to authority, defendants contend Joseph Becktold's testimony is insufficient to overcome the presumption of consideration." California Appellate Opinion, p.15.

Petitioners' opening brief to the CALIFORNIA APPELLATE JUDGES cited fifteen case authorities and one law text and the reply brief cited three California Evidence Codes, five case authorities, and two law texts, establishing the standard for "substantial evidence" in California.[12]

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[12] e.g., "As a rule, an account of a transaction given in a contemporaneous writing when no differences existed outweighs subsequent oral explanation, given after differences have arisen, and at variance with the writing." 31 Cal. Jur. 3d § 691, p. 976, cited in Opening Brief, p.11.

"[I]f the word 'substantial' means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." *Estate of Teed*, 172 CA2d 638, 644 (1952), cited in Reply Brief, p. 22.

(b) The unpublished California Appellate Opinion states as follows:

> "[I]n their opening brief, defendants ignore the trial court's finding of fraud." California Appellate Opinion, p. 14.

Petitioners did not ignore the finding of fraud in our opening brief to the CALIFORNIA APPELLATE JUDGES. We addressed the finding of fraud by attacking each and every factual finding in the Statement of Decision from which fraud was inferred (which inferences were based almost entirely upon "lack of consideration").

(4) The CALIFORNIA APPELLATE JUDGES, not having read or carefully considered our briefs, the evidence, and the entire case, applied a less stringent standard of review than was called for by the applicable rules. They did not apply the "clearly erroneous" standard of review.[13] They

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[13] "'A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with (continued...)

allowed attorney TIMOTHY STOEN's spurious "credibility determinations"[14] when there was only one "permissible view" of the evidence.[15]

(5) The CALIFORNIA APPELLATE JUDGES stated their standard of review as follows:

> "This case turned on the credibility of the witnesses. Neither side produced documentary evidence which convincingly supported its arguments. The duty of this court under these circumstances is to determine whether

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[13](...continued)
the definite and firm conviction that a mistake is committed.' *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)." Cited in *Anderson v. City of Bessemer City, N.C.*, 105 S.Ct. 1504, 1511 (1985).

[14] "This is not to say that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." *Anderson, supra.*, 105 S.Ct. at 1512.

[15] "'Where there are two permissible views of the evidence, the factfinder's choice cannot be clearly erroneous.' *United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949). [Citation omitted.]" *Anderson*, 470 U.S. at 574, 105 S.Ct. at 1511.

substantial evidence supports the trial court's findings.

"'In resolving the issue of the sufficiency of the evidence, we are bound by established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment [citations]' (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925.) 'All issues of credibility are likewise within the province of the trier of fact. [Citation.]' (*Ibid.*) 'When a finding of fact is attacked on the ground that there is no substantial evidence to sustain it, the power of the appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. [Citations.]' (*Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc.* (1967) 66 Cal.2d 782, 784, emphasis in original.)" California Appellate Opinion, pp. 8-9.

(6) The CALIFORNIA APPELLATE JUDGES applied an "any" evidence (substantial or not) standard of review:

"The testimony of a single witness, even a party, may be sufficient to support a finding. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)" California Appellate Opinion, p. 12.

when, unlike the *Mix* case, the testimony they deemed "sufficient to support a find-

ing" was contradicted by the witness's (JOSEPH BECKTOLD's) own prior written statement and by the testimony of former partner ANNE KAYLOR.

(7) The CALIFORNIA APPELLATE JUDGES declared that:

> "...Joseph Becktold's status as an owner or agent is irrelevant. Further, defendants argument fails to show how they relied to their detriment on Joseph Becktold's alleged representations of ownership. As plaintiffs contend, defendants' argument is meaningless." California Appellate Opinion, p. 13.

JOSEPH BECKTOLD lied, either to Petitioners, ANNE KAYLOR, and VELDA BRADY for thirteen years or to the trial court, about his "status as an owner or agent." The CALIFORNIA APPELLATE JUDGES considered this admitted fact "irrelevant" and "meaningless" in a case they said "turned on the credibility of the witnesses".[16] [17]

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[16] "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon it, he is not, in any litigation arising (continued...)

(8) Pursuant to California Rules of Court, Rule 23(b), Petitioners moved that the CALIFORNIA APPELLATE JUDGES admit additional evidence and submitted certified bank copies showing VELDA BRADY's endorsements on three cashiers checks from GREGORY WONDERWHEEL, totalling $2,250. The cashier's checks were canceled by the bank on July 5, 1977, July 6, 1977, and July 14, 1977, respectively. The deed from ANNE KAYLOR to VELDA BRADY and GREGORY WONDERWHEEL was dated June 30, 1977. The deed was recorded on July 12, 1977. The date of the $4,500 transmittal check from VELDA BRADY to ANNE KAYLOR is unknown; the check

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[16](...continued)
out of such statement or conduct, permitted to contradict it." Cal. Evidence Codes § 623. Cited in Petitioners' opening brief to CALIFORNIA APPELLATE JUDGES.

[17] "Such a change of position is sternly forbidden. It involves both fraud and falsehood, and the law abhors both." *City of Long Beach v. Mansel*, 3 C3d 462, 488 (1970). Cited in Petitioners' reply brief to the CALIFORNIA APPELLATE JUDGES.

was not presented in the evidence. The PRIVATE PARTIES stipulated to admit two of the cashier's checks (carbon copies of which were in the trial record) but not the third. Petitioners' motion was denied. The CALIFORNIA APPELLATE JUDGES concluded that "the trier of fact could infer those payments were for amounts past due on the promissory note or for taxes" and ruled: "None of the checks [...] was material to this appeal" in a case which, elsewhere, they declared "turned on the credibility of the witnesses".

(9) The CALIFORNIA APPELLATE JUDGES dismissed GREGORY WONDERWHEEL's original receipts from real estate agent WILDA WILSON, and from the Mendocino County Tax Collector, saying they "do not show he was entitled to more than the one-sixth interest he was awarded", apparently without the precaution of adding them up (WONDERWHEEL's original receipts account for $5,149.55 or

20.1% of the total $25,584 land and tax payments on the property); and without considering WONDERWHEEL's $800 downpayment, admitted by JOSEPH BECKTOLD, or his $2,250 in cashier's checks to VELDA BRADY (totalling $8,199.55, altogether, accounting for 32.0% of the total $25,584 land and tax payments on the property). GREGORY WONDERWHEEL claimed a 1/3 (33.3%) interest in the property.

D. Fourteenth Amendment claims against the Defendants were raised but not heard in the California case.

Petitioners raised our Fourteenth Amendment claims against the Defendants three times in the prior California case, but were denied a hearing: first, in a Petition for Rehearing to the CALIFORNIA APPELLATE COURT filed on August 31, 1988, and denied without comment on September 16, 1988; second, in a Petition for Review to the California Supreme Court filed on September 26, 1988, and denied without comment

on November 9, 1988; and, third, in a Petition for Writ of *Certiorari* to this Court filed on February 3, 1989, and denied without comment on April 3, 1989.

The present federal action was filed in the District Court on April 2, 1990.

II. Relief sought.

Petitioners requested the District Court to: (1) declare the state court Statement of Decision, Judgment, and appellate Opinion "constitutionally invalid"; (2) enjoin the MENDOCINO COUNTY RECORDER from carrying out the provisions of the Superior Court Judgement and order her to restore the deeds to their pre-trial configuration;[18] (3) enjoin any and all judges of the MENDOCINO COUNTY SUPERIOR COURT from enforcing the provisions of the judgment; (4) award compensatory and exemplary damages jointly and severally against the

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[18] The disputed property has been sold by ARTHUR BECKTOLD since the First Amended Complaint was filed. Therefore, other relief must be found.

PRIVATE PARTIES; and (5) award costs and reasonable attorney's fees against all the Defendants under 42 U.S.C. § 1988.

III. Rulings below.

The SUPERIOR COURT, the CALIFORNIA APPELLATE COURT, and the PRIVATE PARTIES moved, in three separate motions, to dismiss the claims against them pursuant to Federal Rules of Civil Procedure 12(b)(6), proffering a number of defenses.

The Federal District Court found that the one-year California statute of limitations on personal injury claims (Cal. Code Civ. Pro. § 340(3)) bars the complaint and therefore "decline[d] to rule on the merits of the case."

The District Court reasoned that, although Petitioners filed our original Federal § 1983 Complaint less than one year after this Court denied *certiorari* in the California case, Petitioners failed to meet the "timely notice of the claims to defen-

dants" and "good faith and reasonable conduct in filing the second, time-barred claim" requirements of the California doctrine of equitable tolling.[19] *Donoghue v. Orange County*, 848 F.2d 926,931 (9th Cir.1987).[20]

Petitioners appealed to the Ninth Circuit which affirmed the District Court in an unpublished Memorandum filed on May 30, 1991. The Ninth Circuit concluded that Petitioners failed to show "that the claims raised in the first proceeding [were] the same as those raised in the second" and that "if the claims are separate and dis-

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[19] Tolling in federal § 1983 actions is "borrowed" from the state tolling practices. *Board of Regents v. Tomanio*, 100 S.Ct. 1790, 1795 (1980).

[20] "California courts have made it clear that there is a 'definitive three pronged test for invocation of this [tolling] doctrine.' [Citation.] The three core elements are (1) timely notice to the defendant in filing the first claim; (2) lack of prejudice to defendant in gathering evidence to defend against the second claim; and, (3) good faith and reasonable conduct by the plaintiff in filing the second claim." *Donoghue v. Orange County*, 848 F.2d, 926, 931 (9th Cir. 1987).

tinct, equitable tolling will not apply" (*Del Percio v. Thornsley*, 877 F.2d 785, 786 n.1 (9th Cir. 1989)); and that Petitioners failed to meet the "timely notice" requirement of *Donoghue, supra.*

ARGUMENTS

I. Introduction.

Petitioners have requested a hearing of our Fourteenth Amendment claims in five courts (including our previous Petition for *Certiorari* in the California case). Every court, both State and Federal, has denied us a hearing.

The District Court told us our claims are not "reasonable" and are in "arguable good faith". We believe the precedents of this Court and the Due Process Clause of the Fourteenth Amendment say otherwise.

Petitioners ask this Court for a statement of how and when the Fourteenth Amendment applies to attorney-written trial court findings because we believe neither

the California courts nor the Ninth Circuit viewed our claims as serious.

This lack of serious consideration led the District Court and the Ninth Circuit Court into carelessness and plain errors in ruling on a Rule 12(b)(6) motion.

The District Court stated that it "declineld] to rule on the merits of the case." But, in fact, the District Court did rule on the merits, hidden in its statute of limitations ruling: "Plaintiffs had their day in court and yet are now suing the very judges who gave them that day in court."

This District Court conclusion is, in itself, unreasonable. Petitioners are entitled to present evidence in support of our claims under 42 U.S.C. § 1983, absent a decision from this Court that facts such as we have asserted would not be a violation of Due Process.

The District Court has, on a Rule

12(b)(6) motion, decided an important constitutional question, of importance to the administration of justice in every state and federal court, which should be decided by this Court.

It has been suggested that Petitioners are asking the District Court to "review" a state court decision. This is not the case. We asked the CALIFORNIA APPELLATE JUDGES and the California Supreme Court to consider our Fourteenth Amendment claims, but the state courts declined to consider the issue. Since the California appellate review did not take into consideration that the trial court findings were written by the prevailing attorney, there has been no adjudication of our Due Process claims.

That the District Court must examine the record of and the evidence in the California case to determine whether Due Process violations occurred is not barred

under 42 U.S.C. § 1983.[21]

Furthermore, the doctrine of *res judicata* does not apply in this case.

This Court has ruled:

> "The State must satisfy the applicable requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment." *Kremer v. Chemical Const. Corp.*, 102 S.Ct. 1883, 1898 (1982).

II. The Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings in ruling on a Rule 12(b)(6) motion to dismiss as to call for an exercise of this Court's power of supervision.

A. The Complaints assert, as a matter of fact, that Petitioners raised our present Due Process claims in the prior California proceedings.

Petitioners' First Amended Complaint

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[21] "It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment 'against State action, ... whether that action be executive, legislative, or judicial.' *Ex parte Virginia*, 100 U.S. 339, 346, 25 L.Ed 676 (emphasis supplied)." *Mitchum v. Foster*, 407 U.S. 225, 240, 92 S.Ct. 2151, 2161, 32 L.Ed.2d 705 (1972).

asserts the following facts:

> "56. [Plaintiffs] filed a petition for rehearing with the Court of Appeal on August 31, 1988. [Plaintiffs] asserted [...] that misconduct in misapplying the law and misstating the facts in the Statement of Decision written by the prevailing attorney denied [Plaintiffs] a fair trial; that deference by the Court of Appeal to the Statement of Decision written by Defendant STOEN denied [Plaintiffs] their right to an independent judicial decision and notice of findings of fact and conclusions of law under the Due Process Clause of the Fourteenth Amendment and that the misapplication by the Court of Appeal of a state law single witness substantiality test for credibility denied [Plaintiffs] their right to equal protection of the laws under the Fourteenth Amendment.
>
> "57. The Court of Appeal denied the petition for rehearing on September 16, 1988.
>
> "58. On September 26, 1988, [Plaintiffs] filed with the Supreme Court of the State of California a petition for review of the State Appellate Court decision. This petition was denied on November 9, 1988.
>
> "59. On February 3, 1989, [Plaintiffs] filed a Petition for Writ of Certiorari with the Supreme Court of the United States. This petition was denied on April 3, 1989." First Amended Complaint, pp. 35-36, paragraphs 56-59 (*see also* original Complaint, pp. 60-61, paragraphs 119-122).

The Ninth Circuit Memorandum concludes as follows:

"Under California law, a plaintiff claiming tolling must initially show that the claims raised in the first proceeding are the same as those raised in the second. *See Del Percio v. Thornsley,* 877 F.2d 785, 786 n.1 (9th Cir. 1989). If the claims are separate and distinct, equitable tolling will not apply. *Id.*" Memorandum, p. A-6.

The Ninth Circuit ruled in *Del Percio* as follows:

"While equitable tolling does apply in § 1983 cases, [citation], the doctrine is not available to Del Percio here because the claims she raised in the administrative proceedings are separate and distinct from the claims she raises against defendants in this case. [Citation.] In her administrative proceedings [...] Del Percio only sought to challenge the recommendation of the Commission's Committee of Credentials; she did not raise any claim of unconstitutional conduct by the officials of the local Capistrano School District--the defendants in this case." *Del Percio, supra.,* at p. 786, n. 1. (emphasis added).

B. On a Rule 12(b)(6) motion to dismiss, all factual matters asserted in the Complaint should be construed favorably to Plaintiffs.

This Court has ruled:

"When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by

> affidavit or admission, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 94 S.Ct. 1683, 1686 (1974).

Simply stated, the fundamental principle of law here is that <u>the courts may not decide issues of fact without evidence</u>.

Petitioners' Complaints clearly assert that we raised the same claims in the prior California proceedings that we raise in the present § 1983 action. By finding to the contrary, the Ninth Circuit has, without notice to Petitioners, converted a Rule 12(b)(6) motion into a motion for summary judgment without allowing Petitioners an opportunity to present the questioned Petitions for review at an evidentiary hearing.

A factual finding on a Rule 12(b)(6) motion contrary to factual assertions in the complaint is not allowed in the accepted and usual course of judicial proceedings and is contrary to fundamental principles of law. The Ninth Circuit ruling, therefore, is plain error.

III. The PRIVATE PARTIES and the CALIFORNIA APPELLATE JUDGES were notified of the claims against them fourteen days after the claims accrued.

The Ninth Circuit found that:

> "Wonderwheel and Weber first became aware of their federal claims after the court of appeals affirmed the trial court's decision in the partition suit. Therefore, Wonderwheel and Weber were aware of their claims by September 16, 1988, when they filed their petition for rehearing [sic]. As they did not file this suit until April 2, 1990, it is barred under the California one-year statute of limitations unless the tolling doctrine applies." Memorandum, p. A-5.

and then concluded:

> "[A]ppellants fail to meet the timely notice requirement for equitable tolling to apply under *Donoghue*. Neither the petition for rehearing nor the petition for certiorari in the initial state partition action put the defendants on timely notice of a future

lawsuit against them, as contended by appellants. Thus, Wonderwheel and Weber clearly do not meet the requirements for equitable tolling." Memorandum, p. A-6.

Petitioners' claims accrued when the California "Court of Appeals affirmed the trial court's decision in the partition suit", on August 17, 1988. The three petitions in the California case were filed on August 31, 1988 (Petition for Rehearing to the CALIFORNIA APPELLATE COURT; denied on September 16, 1988), on September 26, 1988 (Petition for Review to the California Supreme Court), and on February 3, 1989 (Petition for Writ of *Certiorari* to this Court).

Each of these three petitions in the California case raised Petitioners' present constitutional claims against the Defendants herein. Therefore the PRIVATE PARTIES and the CALIFORNIA APPELLATE JUDGES received notice of our federal constitutional claims against them fourteen days

after the claims accrued.

IV. The District Court's reasoning on "timely notice" is without foundation and contrary to California equitable tolling doctrine.

While the Ninth Circuit gave no reasons for its conclusion that the Defendants did not receive timely notice, the District Court's reasoning, affirmed by the Ninth Circuit, was as follows:

> "Plaintiffs' appeals to the California Supreme Court and the U.S. Supreme Court gave insufficient notice to the Defendants that they would be subject to a suit in Federal District Court. Plaintiffs assert that their 'petitions on appeal were timely filed and clearly informed defendants of plaintiff's constitutional claims and determination to achieve justice.' Plaintiffs' opposition to Superior Court motion at 19. It may be true that the 'Defendants' were informed of plaintiffs' desire for justice. However, a reasonable person would assume once the U.S. Supreme Court has denied a litigant's petition for certiorari, that the denial will be the end of a long and protracted legal battle and not the beginning of a new one. Moreover, the judicial Defendants were not parties to the original suit and its subsequent appeals. Thus, to say that Plaintiffs' journey through the appellate process put the Superior Court and the Court of Appeals on notice of a potential cause of action against

them is unfounded." District Court Order filed July 30, 1990, p. A-22 to A-23.

A. A "reasonable person" would assume Petitioners have a Due Process Right to a hearing of our constitutional claims in federal court when we were denied a hearing in the California case.

Many legal battles continue in a new form or forum after this Court has denied *certiorari* if there are issues left unadjudicated, as exemplified by a similar § 1983 case decided by the Ninth Circuit as follows:

> "Proceeding under the doctrinal umbrella of res judicata, we find that Robinson's due process claims were not and could not have been litigated in the *McBryde* state proceedings because the Hawaii Supreme Court refused to consider Robinson's federal claims. [citation omitted]" *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), at 1472. (overturned on the grounds that the claims were "unripe", 106 S.Ct. 3269 (1986); citation and emphasis added)
>
> "If the procedural posture of the state court action had, for some reason, altogether prevented the plaintiffs from raising federal constitutional claims in their petition for rehearing, the federal district court would have had original jurisdiction

> over those claims. *Wood v. Orange County,* 715 F.2d 1543, 1546-47 (11th Cir. 1983) *cert denied,* 104 S.Ct. 2398 (1984). We are loath to grant less constitutional protection where plaintiffs have responsibly exercised an opportunity to raise their claims and have been turned away from the state tribunal without so much as an explanation. Like the court in *Wood*, we are concerned that '[s]uch a result might deprive [plaintiffs] of any forum, state or federal, where [they have] a reasonable opportunity to present [their] federal constitutional claims, a result arguably contrary to the requirement of due process.' *Id.* at 1547." *Robinson, supra,* at 1473 n.3. (Brackets in original; emphasis added.)

The District Court's reasoning in the present case is in conflict with the Eleventh Circuit in *Wood* and with the prior Ninth Circuit decision in *Robinson.* In the *Robinson* case, this Court had denied Robinson's Petition for Writ of *Certiorari* in a prior state court action (*McBryde Sugar Co. v. Robinson,* 54 Haw. 174, 504 P.2d 1330, *aff'd on rehearing* 55 Haw. 260, 517 P.2d 26 (1973) *appeal dismissed and certs. denied,* 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 (1974)). Nonetheless, the

Ninth Circuit concluded that Robinson "arguably" had a due process right to a hearing of his constitutional claims in federal court since, although he had "responsibly raised" them, he was "turned away from the state tribunal", including this Court, and his claims "were not and could not have been litigated in the state proceedings".

Accordingly, Petitioners assert: (1) that our conduct in filing the present federal § 1983 action is entirely reasonable since we "responsibly raised" our federal constitutional claims in the state court case but were "turned away from the state tribunal without so much as an explanation" and (2) that we have a Due Process Right to a hearing of our federal constitutional claims in federal court, having been denied a hearing of these claims in the prior state court action.

Petitioners know of no precedent, and the District Court did not cite any, for

the conclusion that this Court's denial of *certiorari* in a state court case should be the end of federal constitutional claims raised in that case if the claimants were denied a hearing of their federal constitutional claims in the state case and the claims remain unadjudicated.

B. Even if this Court should conclude that the judicial defendants have been properly dismissed, there is no reason to dismiss the claims against the PRIVATE PARTIES.

Even if this Court should conclude upon review that the claims against JUDGE BROADDUS and the CALIFORNIA APPELLATE JUDGES should be dismissed for lack of timely notice, there is no reason to dismiss the claims against the PRIVATE PARTIES, who were parties to the prior California case and were served with notice of the claims against them in the three post-appeal petitions in the California case.

> "That the state official is no longer in the suit, or that the officer has acted unlawfully or outside the scope

of his or her authority is no defense. *See Dennis v. Sparks,* 449 U.S. 24, 28 n. 4, 101 S.Ct. 183, 186 n.4, 66 L.Ed. 2d 185 (1980); [citation omitted]." *Howerton v. Gabica,* 708 F.2d 380, 381 (9th Cir. 1983), at n.6.

C. The California Petition for Rehearing was submitted directly to the CALIFORNIA APPELLATE JUDGES.

While the California JUDGES who heard and reviewed the case were not parties to the case, they were participants in the case, and not ignorant third parties. Furthermore, the California Petition for Rehearing was submitted directly to CALIFORNIA APPELLATE COURT JUDGES NEWSOM, ELKINGTON, and HOLMDAHL. This Petition raised our federal constitutional claims against those JUDGES and clearly notified them of our constitutional claims against them.

D. California tolling doctrine does not require plaintiffs to bring the second claim while they are "legally prevented" from doing so.

The California Supreme Court has stated:

"The Legislature has provided for ex-

> clusion from the statutory period of the time during which commencement of an action is stayed by injunction or statutory prohibition (Code Civ. Proc., § 356). This section has been applied in situations where the action is legally prohibited by other means than injunctions or statutory prohibition. (See 2 Witkin, Cal. Procedure (2d ed. 1970) Actions, §§ 381-383, pp. 1216-1218.) The limitation period has been tolled during the period in which a plaintiff is legally prevented from taking action to protect his rights. [...] (See also *County of Santa Clara v. Hayes Co.* (1954) 43 Cal.2d 615 [275 P.2d 456].)" *Hoover v. Galbraith,* 7 C.3d 519, 526; 102 Cal.Rptr. 733, 498 P.2d 981 (1972).

In *County of Santa Clara v. Hayes Co., supra.,* the California Supreme Court ruled that issues resolved in *quo warranto* proceedings (*People v. County of Santa Clara,* 37 Cal.2d 335; 231 P.2d 826 (1951)) "legally prevented" the County of Santa Clara from proceeding against a third party, Hayes Co., and tolled the statute during that period (despite the fact that Hayes Co. had no notice of the claims against it):

> "'It is well recognized that the running of the statute of limitations is

suspended during any period in which the plaintiff is legally prevented from taking action to protect his rights.' [Citations omitted.]" *County of Santa Clara v. Hayes, supra.,* at 618.

E. Petitioners were "legally prevented" from filing parallel claims in federal court while the California appeal was still pending by long established abstention doctrines and principles of federalism and comity.

Requiring Petitioners to file parallel claims in federal court, while the California appeal was still pending before the U.S. Supreme Court, in order to satisfy the "timely notice of claims" requirement of *Donoghue, supra,* violates long established abstention doctrines and the principles of federalism and comity. Had Petitioners filed such a complaint in federal court it would certainly have been dismissed on those grounds. *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed-.2d 669 (1971).

Thus, it is not in conformity with California equitable tolling doctrine and it is unduly burdensome to Petitioners to require that we should have filed a parallel federal suit, which was "legally prevented" and would certainly have been dismissed, in order to provide notice to JUDGE BROADDUS and <u>additional</u> notice to the PRIVATE PARTIES and the CALIFORNIA APPELLATE JUDGES of the federal constitutional claims against them.

V. The District Court's conclusion that Petitioners "had their day in court" so far departs from the accepted and usual course of judicial proceedings in ruling on a Rule 12(b)(6) motion as to call for an exercise of this Court's power of supervision.

The District Court concluded that:

> "[I]t is of arguable good faith to engage in this lawsuit. Plaintiffs had their day in court and yet are now suing the very judges who gave them that day in court. Plaintiffs have also not explained how the filing of this second suit is reasonable conduct, beyond making conclusory statements that it is. Therefore, the Court holds does not [sic] come to the level of good faith and reasonable conduct required by the California

doctrine of equitable tolling." District Court Order filed July 30, 1990, pp. A-23 to A-24.

By definition, Petitioners did not have our day in court: (1) if we were denied a hearing of our federal constitutional claims in the state court case; and (2) if our due process rights were violated in the conduct of the state court case, which is the claim we asked the District Court to hear.

It is not *a priori* unreasonable or in "arguable good faith" to sue a judge or judges for declaratory and injunctive relief from unconstitutional judgments in a state court case.[22] Judges are "persons" in their official capacities under § 1983. *See Will v. Michigan Dept. of State Police,*

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[22] "Although injunctive relief against a judge rarely is awarded, the United States Courts of Appeals that have faced the issue are in agreement that judicial immunity does not bar such relief. [Footnote omitted.] This Court, however, has never decided the question. [Footnote omitted.]." *Pulliam v. Allen*, 466 U.S. 519, 528, 104 S.Ct. 1970, 1974 (1984).

109 S.Ct. 2304, 2311 n.10 (1989). It is not *a priori* unreasonable or in "arguable good faith" to sue private persons for damages resulting from their conspiracy to deprive Petitioners of our Due Process Rights in a state court case.

The District Court may not assume the conclusion of the issue raised in our Complaint, i.e, that Petitioners "had their day in court", on a Rule 12(b)(6) motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957) (footnote omitted; emphasis added). *See also Scheuer v. Rhodes, supra.; Gardner v. Toilet Goods Assn.*, 387 U.S. 167, 172, 87 S.Ct. 1526, 1529. (1967).

VI. The precedents of this Court indicate that if our factual assertions are proved true, then our Due Process Rights were violated in the California case.

A. This Court has severely criticized attorney-written decisions.

Twenty seven years ago this Court saw fit to quote Judge J. Skelly Wright at length as follows:

> "'We all know what has happened. Many courts simply decide the case in favor of the plaintiff or the defendant, have him prepare the findings of fact and conclusions of law and sign them. This has been denounced by every court of appeals save one. This is an abandonment of the duty and the trust that has been placed in the judge by these rules. It is a noncompliance with Rule 52 specifically and it betrays the primary purpose of Rule 52--the primary purpose being that the preparation of these findings by the judge shall assist in the adjudication of the lawsuit.
>
> "'I suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as determining why the judge decided the case.' Seminars for Newly Appointed United States District Judges (1963), p.166." *United States v. El Paso Natural Gas Co.*, 84 S.Ct. 1044 (1964), p. 1047 at n. 4.

That is precisely what happened in the

underlying California case, except that the lawyer who wrote the SUPERIOR COURT Statement of Decision, TIMOTHY STOEN, went far beyond what he "possibly could" under any standard of professional ethics.

B. This Court has called for a more stringent standard of appellate review when there is reason to doubt that the lower court findings represent the judge's own considered conclusions.

This Court has set the following test for attorney-written decisions:

> "[T]he District Court in this case does not appear to have uncritically accepted findings prepared without judicial guidance by the prevailing party. The court itself provided the framework for the proposed findings when it issued its preliminary memorandum, which set forth its essential findings and directed petitioner's counsel to submit a more detailed set of findings consistent with them. Further, respondent was provided and availed itself of the opportunity to respond at length to the proposed findings. Nor did the District Court simply adopt petitioner's proposed findings: the findings it ultimately issued--and particularly the crucial findings [...]--vary considerably in organization and content from those submitted by petitioner's counsel. Under these circumstances, we see no reason to doubt that the findings

> issued by the District Court represent the judge's own considered conclusions. There is no reason to subject those findings to a more stringent appellate review than is called for by the applicable rules." *Anderson v. City of Bessemer City, N.C.*, 105 S.Ct. 1504, 1511 (1985) (emphasis added).

The obvious corollary to the Court's decision in *Anderson* is that if there is "reason to doubt that the findings issued by the [lower court] represent the judge's own considered conclusions" then there is "reason to subject those findings to a more stringent appellate review than is called for by the applicable rules."

C. Petitioners' claims are legally well founded in the precedents of this court.

The CALIFORNIA APPELLATE JUDGES applied a less stringent standard of review in a case where there was "reason to doubt that the findings issued by the [trial court] represent[ed] the judge's own considered conclusions".

Therefore, it is certainly not "beyond doubt" (*Conley v. Gibson, supra*, 355 U.S.

at 45-46, 78 S.Ct. at 102) that Petitioners' claims do not constitute a violation of our Fourteenth Amendment Due Process Rights and we are entitled to present evidence in support of our claims and to a decision on the merits.

VII. Petitioners explained why our conduct is "reasonable and in good faith" at the hearing of the motions to dismiss our claims.

The District Court concluded that:

> "Plaintiffs have also not explained how the filing of this second suit is reasonable conduct, beyond making conclusory statements that it is." District Court Order Filed July 30, 1990, pp. A-23 to A-24.

At the hearing of the Motions to dismiss brought by the SUPERIOR COURT and the CALIFORNIA APPELLATE COURT, Petitioner WONDERWHEEL, appearing *In Pro Per*, explained as follows:

> THE COURT: "Defendants question whether in fact you're proceeding in good faith. I want your response to that. They say you're making conclusory statements, you've had your day in court, and indeed, all you're doing here is suing the very judges who gave you your day in court below, and that

I should not conclude that that's a good faith lawsuit and reasonable conduct required by the equitable tolling statute...or principle.

WONDERWHEEL: "Whether we've had our day in court is the -- is the fundamental question that we're asking the court to decide, and plaintiffs (sic), by making that argument, are trying to get out of hearing the matter based on the facts; they're trying to deny the question that we raise, a hearing on its merits, by frankly, your honor, misstating the facts that we've had a hearing on this issue. We have not had a hearing on this issue.

"When it first became clear to us that we -- that this issue was even in existence, we immediately presented our petition to the appellate court for a petition for rehearing; that petition was denied without opinion. We immediately went to the California Supreme Court; that petition was denied. We immediately went to the U.S. Supreme Court; that petition was denied. If we had had a hearing on any one of those petitions, then in fact this case would have no standing before this court, but we haven't had a hearing on any of those claims which we made when we first became aware of them, and --

THE COURT: "You went through the entire state appellate process.

WONDERWHEEL: "We attempted to; we didn't get any hearing on the issue that we raised as soon as we became aware of the issue.

THE COURT: "What did you get?

WONDERWHEEL: "We got a single page that says "Petition Denied."

Official Transcript of Proceedings at Hearing on July 23, 1990.

Petitioner WONDERWHEEL did considerably more than make "conclusory statements" explaining our good faith and the reasonableness of our conduct in filing our claims in federal court; and the District Court erred in overlooking his explanation.

VIII. This Court's decision in *Anderson* requires explanation so that the Federal and State courts may uniformly apply it.

This Court has not made a definitive ruling on how far within or beyond the "clearly erroneous" standard reviewing courts can or should go or what the requirements of the Due Process Clause are when there <u>is</u> reason to doubt that the trial court findings "represent the judge's own considered conclusions".

A. The California courts are completely silent on the issue of attorney-written findings.

There is no California case law, whatsoever, that Petitioners can find, on the issue of attorney-written court findings or standards of review of such findings. Furthermore, the CALIFORNIA APPELLATE COURT and the California Supreme Court refused to consider this issue when Petitioners raised it in our petitions in the California case.

B. The Ninth Circuit is in conflict with this Court and with other Federal Circuits in its interpretation of *Anderson*.

The Ninth Circuit has ruled:

> "The government faults the district court for adopting many of plaintiffs' findings 'essentially word for word.' However there is no legal infirmity in the district court's so doing. As the government concedes, even when the trial judge adopts proposed findings of facts verbatim, those findings may be reversed only if clearly erroneous. *See* Fed.R. Civ.P. 52. *See also Anderson v. City of Bessemer,* 470 U.S. 564, 571-73, 105 S.Ct. 1504, 1511, 84 L.Ed-.2d 518 (1985). [Citation omitted.]" *Orantes-Hernandez v. Thornburgh,* 919 F.2d 549, 567 (9th Cir. 1990). [Emphasis added.

As Judge J. Skelly Wright said in *The Nonjury Trial*, cited by this Court in the

recent *Anderson* case and twenty-seven years ago in *El Paso*:

> "This practice has been denounced by every court of appeals save one. This is an abandonment of the duty and the trust that has been placed in the judge by these rules. It is a noncompliance with Rule 52 specifically and it betrays the primary purpose of Rule 52." [Emphasis added.] *See* Argument IV.A.(1), above.

The Ninth Circuit is plain wrong in announcing that there is "no legal infirmity" in noncompliance with Rule 52. This wrong view clearly prejudices the Ninth Circuit in determining the "reasonableness" of Petitioners' claims in the present case.

C. Other Federal Circuit Court rulings on attorney-written findings, both before and after *Anderson*.

The Eleventh Circuit has ruled:

> "This circuit and other appellate courts have repeatedly condemned the ghostwriting of judicial orders by litigants. *See, e.g., Keystone Plastics, Inc. v. C & P Plastics, Inc.*, 506 F.2d 960 (5th Cir. 1975); *Bradley v. Maryland Casualty Co.*, 382 F.2d 415 (8th Cir. 1967); *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719 (4th Cir.), *cert. denied*, 368 U.S. 825, 82 S.Ct. 44, 7 L.Ed.2d 29 (1961). The

cases admonishing trial courts for verbatim adoption of proposed orders drafted by litigants are legion. *See, e.g., Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 105 S.Ct. 1504, 1510-1511, 84 L.Ed.2d 518 (1985); *Louis Dreyfus & Cie. v. Panama Canal Co.*, 298 F.2d 733, 737 (5th Cir.1962); *Cuthbertson v. Biggers Bros., Inc.*, 702 F.2d 454, 458-59 (4th Cir. 1983); *In re Las Colinas, Inc.*, 426 F.2d 1005, 1009 & n.4 (1st Cir. 1972), *cert. denied*, 405 U.S. 1067, 92 S.Ct 1502, 31 L.Ed.2d 797 (1972)." *In re Colony Square Co.*, 819 F.2d 272, 274-275 (11th Cir. 1987).

The District of Columbia Circuit has ruled:

"[Appellant] contends that the Supreme Court created an exception to the 'clearly erroneous' standard in *Anderson* [...] We reject this reading of *Anderson*. In that case, after noting that its earlier decisions had without exception upheld the 'clearly erroneous' standard even when a trial judge had accepted proposed findings verbatim, the Court found that the district court had *not* 'uncritically accepted' proposed findings, and thus that there was 'no reason to subject those findings to a more stringent applicable rules.' [Citation omitted.] We recognize that this language is enigmatic, but we do not believe that it admits an exception to the standard of review enunciated in Rule 52(a). [...] If the record below does not permit a confident assessment of the trial court's findings, the proper course for an appellate court is to remand for further factfinding, not to engage in its own guesswork.

See Andre v. Bendix Corp., 774 F.2d 786 (7th Cir. 1985)." *Berger v. Iron Works Reinforced Rodmen Local 201*, 843 F.2d 1395, 1407-08 n.3. (D.C. Cir. 1988)

The First Circuit has ruled:

> "[T]he greater the extent to which the court's eventual decision reflects no independent work on its part, the more careful we are obliged to be in our review." *In re Las Colinas, Inc.*, 426 F.2d 1005, 1010 (1st Cir. 1970).

The Fifth Circuit has ruled:

> "'[W]e can take into account the District Court's lack of personal attention to factual findings in applying the clearly erroneous rule.' *Wilson v. Thompson*, 593 F.2d 1375, 1384 n.16 (5th Cir. 1979). [Citation omitted.]" *Amstar Corporation v. Domino's Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir. 1980).

IX. This Court should clarify what the Fourteenth Amendment requires in cases where the trial court findings are written by the prevailing attorney and what standard of appellate review is needed to meet the Fourteenth Amendment requirements.

Petitioners request this Court to declare what litigants may reasonably expect their Fourteenth Amendment Due Process Rights are, both from the trial court and the reviewing court, in cases where there

is reason to doubt that the findings represent the judge's own considered conclusions. Under what circumstances should it be concluded that a trial court judge has "abdicated his judicial duties" and what is the duty of a reviewing court in such a case in light of the Fourteenth Amendment?

Petitioners request this Court to set out the Constitutional framework within which our reasonableness and good faith should be viewed by the Ninth Circuit, for the benefit not only of the District Court and the Ninth Circuit, but every State and Federal Court in the United States, among which the diversity of views ranges from complete silence (California) to detailed guidelines for review of attorney-written findings to the Ninth Circuit opinion that there is "no legal infirmity" in courts adopting attorney-written findings verbatim.

These issues have not been and should be decided by this Court.

CONCLUSION

Petitioners assert that our Fourteenth Amendment claims raise Constitutional issues important to the administration of justice and the Due Process Rights of litigants in every court in the United States, State or Federal and that these issues should be decided by this Court.

We further assert that the Ninth Circuit and the District Court decisions in the present case conflict with applicable decisions of this Court and other U.S. Courts of Appeals, and that the District Court and the Ninth Circuit have so far departed from the accepted course of proceedings in ruling on a Rule 12(b)(6) motion to dismiss as to require an exercise of this Court's power of supervision.

Should the Court grant our Petition for a Writ, Petitioners will do our utmost

to obtain *pro bono* legal representation to brief the Court for us in this matter.

For the foregoing reasons, Petitioners respectfully pray this Court to issue a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit.

Dated: August 16, 1991.

Respectfully submitted,

_____

Alan Gregory M.L.V. Wonderwheel
Petitioner *In Propria Persona*

_____

John R. Weber
Petitioner *In Propria Persona*

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUL 19, 1991

ALAN GREGORY WONDERWHEEL, M.L.V.; JOHN R. WEBER,	)	No. 90-16229
Plaintiffs-Appellants,	)	DC No. CV-90-0096-TEH
v.	)	
MENDOCINO SUPERIOR COURT; CALIFORNIA FIRST APPELLATE DISTRICT; TIMOTHY O. STOEN; VELDA G. BRADY; ARTHUR L. BECKTOLD; JOSEPH BECKTOLD,	)	
Defendants-Appellees	)	ORDER

Appeal from the United States
District Court for the
Northern District of California

Before: HUG, POOLE, and FERGUSON,
Circuit Judges.

The panel, as constituted in the above case, has voted unanimously to deny the petition for rehearing filed by appellants on June 12, 1991.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAY 30, 1991

ALAN GREGORY WONDERWHEEL, M.L.V.; JOHN R. WEBER,	No. 90-16229
Plaintiffs-Appellants,	DC No. CV-90-0096-TEH
v.	
MENDOCINO SUPERIOR COURT; CALIFORNIA FIRST APPELLATE DISTRICT; TIMOTHY O. STOEN; VELDA G. BRADY; ARTHUR L. BECKTOLD; JOSEPH BECKTOLD,	
Defendants-Appellees	MEMORANDUM[1]

Appeal from the United States
District Court for the
Northern District of California

Thelton E. Henderson, District Judge,
Presiding

Submitted March 11, 1991[2]
San Francisco, California

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[1] This disposition is no appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Circuit Rule 34-4.

I. OVERVIEW

Plaintiff-appellants Alan Wonderwheel and John Weber ("Wonderwheel and Weber") appeal the district court's dismissal of their claims under 42 U.S.C. §§ 1983 and 1988. Wonderwheel and Weber brought suits against the Superior Court of California and the First Appellate District ("Judges"), and private parties Timothy Stoen, Velda Brady, and Arthur and Joseph Becktold ("Stoen, et al."). We affirm.

A. Statute of Limitations

We review dismissal on statute of limitations grounds de novo. Donoghue v. Orange County, 848 F.2d 926, 292 (9th Cir. 1987). In order to determine the proper statute of limitations to apply in a section 1983 action, we look to the local statute of limitations for personal injury claims. See, e.g., Wilson v. Garcia, 471 U.S. 261, 279-80 (1985). The California statute of limitations for personal injury

is one year. See Cal. Code Civ. Proc. § 340(3) (West Supp. 1991); Usher v. City of Los Angeles, 828 F.2d 556, 558 (9th Cir. 1987) (section 340(3) establishes the relevant statute of limitations period for section 1983 actions.)

Wonderwheel and Weber first became aware of their federal claims after the court of appeals affirmed the trial court's decision in the partition suit. Therefore, Wonderwheel and Weber were aware of their claims by September 16, 1988, when they filed their petition for rehearing. As they did not file this suit until April 2, 1990, it is barred under the California one-year statute of limitations unless the tolling doctrine applies.

The appellants contend that the statute was equitably tolled during the time they were pursuing their appeals of the state action. The California equitable tolling doctrine does not apply to this

case for numerous reasons. Under California law, a plaintiff claiming tolling must initially show that the claims raised in the first proceeding are the same as raised in the second. See Del Percio v. Thornsley, 877 F.2d 785, 786 n.1 (9th Cir. 1989). If the claims are separate and distinct, equitable tolling will not apply. Id. In addition, appellants fail to meet the timely notice requirement for equitable tolling to apply under Donoghue. Neither the petition for rehearing nor the petition for certiorari in the initial state partition action put the defendants on timely notice of a future lawsuit against them, as contended by appellants. Thus, Wonderwheel and Weber clearly do not meet the requirements for equitable tolling.

B. Attorneys' Fees, Double Costs, Sanctions

Stoen, et al. request sanctions against Wonderwheel and Weber. The dis-

trict court refused to impose sanctions. Stoen, et al. failed to cross-appeal this issue, thus, may not raise it now. See, e.g., Hudson v. Western Airlines, Inc., 851 F.2d 261, 267 (9th Cir. 1988).

Also, the request of Stoen, et al. for attorneys' fees and double costs on this appeal is also denied.

AFFIRMED.

JOHN K. VAN DE KAMP, Attorney General
of the State of California
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Attorneys for Defendants

ORIGINAL FILED
Oct 9, 1990

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALAN GREGORY M.L.V. WONDERWHEEL and JOHN R. WEBER,	No. C90-0976-TEH
Plaintiffs,	
v.	STATUS CONFERENCE ORDER
SUPERIOR COURT OF THE STATE OF CALIFORNIA AND FOR THE COUNTY OF MENDOCINO, et al,	
Defendants.	

On September 19, 1990 at 3:00 p.m., a Status Conference was held before the Honorable Thelton E. Henderson. Present were Jeanine B. Bauman, Deputy County Counsel,

Mendocino County, Jane A. Zack, Deputy Attorney General, Alan Gregory Wonderwheel, Plaintiff in propria persona, and John R. Weber, Plaintiff in propria persona.

The court and the parties present discussed and considered the status of the present case and of the Amended Complaint in particular, given the fact that the court's decision on the original Complaint is pending before the Ninth Circuit Court of Appeals. After discussion and consideration, it is hereby ordered as follows:

The action on the Amended Complaint is stayed, pending resolution of the Ninth Circuit Appeal. Within 30 days of the Ninth Circuit's decision regarding the appeal, another Status Conference will be set between all parties and the court, to discuss any remaining issues.

It is so ordered.

Dated: Oct 9, 1990

/s/THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

Approved as to form:

/s/JEANINE B. BAUMAN
Deputy County Counsel
Mendocino County

/s/ALAN GREGORY M.L.V. WONDERWHEEL

/s/TIMOTHY O. STOEN

/s/JOHN R. WEBER

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED
AUGUST 1, 1990

ALAN GREGORY M.L.V. WONDERWHEEL and JOHN R. WEBER, Plaintiff, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF MENDOCINO, et al., Defendants.	)	No. C-90-0976 TEH ORDER

Defendants, Timothy Stoen, Velda Brady, Arthur Becktold and Joseph Becktold ("the private party defendants") bring this motion to dismiss the claims against them pursuant to Fed.R.Civ.P. 12(b)(6).[1] Defendants Stoen, Brady and the Becktolds argue in support of this motion that a) the

[1] Plaintiffs have since filed an amended complaint pursuant to Fed. R. Civ. P. 15(a). As the claims against the private party defendants have not changed, the Court has decided to issue its order based upon the original briefings. This order, however, applies to Plaintiffs' amended complaint.

complaint is barred by the statute of limitations; b) the complaint fails to state a claim; and c) the complaint is barred by the doctrine of res judicata. They further request that Plaintiffs be sanctioned under Rule 11 of the Fed. R. Civ. P.

The only federal claims brought against the private party defendants are alleged violations of protected rights under 42 U.S.C. §§ 1983 and 1988.[2] The balance of the claims against these Defendants are pendant state law claims. Thus, for the reasons stated in the Court's order of July 30, 1990, dismissing the complaints against the Superior Court and the Court of Appeals, the causes of action against the

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[2] 42 U.S.C. § 1988 does not set forth a separate cause of action. Instead, § 1988 authorizes the adoption or incorporation of state law as source of law to be utilized in the enforcement of the substantive provisions of the Civil Rights Act. See, Moor v. County of Alameda, 411 U.S. 693, 705 (1972). Thus, it is under § 1988 that the state statute of limitations for personal injuries is borrowed for actions brought under § 1983. As well, § 1988 authorizes the award of attorneys fees for actions under the Civil Rights Acts.

private party defendants under 42 U.S.C. §§ 1983 and 1988 are dismissed as time-barred. All pendant state law claims against these defendants are dismissed for lack of federal jurisdiction. Moreover, for the same reasons as were stated in the order of July 30, 1990, the Court declines to order sanctions in this matter.

Accordingly, and good cause appearing, the motion to dismiss by Defendants Timothy Stoen, Velda Brady, Joseph Becktold and Arthur Becktold is GRANTED and the claims against these Defendants are DISMISSED. Defendants' motion for sanctions pursuant to Fed. R. Civ. P. 11 is DENIED.

IT IS SO ORDERED.

Dated: July 31, 1990

/s/THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED
JULY 30, 1991

ALAN GREGORY M.L.V. WONDERWHEEL and JOHN R. WEBER,	)	
Plaintiff,	)	No. C 90-0976 TEH
vs.	)	
SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF MENDOCINO, et al.,	)	**ORDER**
Defendants.	)	

Defendants, Superior Court for Mendocino County and California Court of Appeal bring this motion to dismiss the claims against them pursuant to Fed. R. Civ. P. 12(b)(6). Defendants argue that the cause of action is improper because: 1) the claims are barred by the Eleventh Amendment; 2) the courts are not "persons" under 42 U.S.C. 1983[1]; 3) the claims are barred

[1] In their opposition, Plaintiffs state that they intend to amend their complaint to substitute named judicial officers for the courts. They have not made such a motion.

by the doctrine of res judicata; 4) the statute of limitations has run on the § 1983 actions and the Plaintiffs have failed to comply with the California State Tort claims Act requirements for filing claims against the State; 5) this Court should abstain from reviewing the courts' decisions; and 6) Plaintiffs have failed to state a claim under 42 U.S.C 1983. Finally, the Court of Appeals requests that the Plaintiffs be sanctioned under Fed. R. Civ. P. Rule 11 for filing a completely meritless claim.

BACKGROUND

This suit arises out of a state court partition action brought by Defendants Velda Brady, Arthur Becktold and Joseph Becktold against Plaintiffs Wonderwheel and Weber (hereinafter referred to as Plaintiffs). The Superior Court issues a tentative ruling in favor of Brady and the Becktolds.

Plaintiffs requested that the Court issue a Statement of Decision pursuant to Cal. Code. of Civ. Pro. § 632. The Superior Court judge, following California Court Rule 632, directed prevailing attorney Timothy Stoen to prepare a draft statement. Although Wonderwheel and Weber filed objections to this decision, the Court eventually adopted the draft statement and the judgement was entered on October 30, 1986.

Weber and Wonderwheel, appearing in propria persona,[2] appealed to the California Court of Appeals, another defendant in this action. Plaintiffs argued that the trial court's decision was not supported by the evidence, the Court disagreed in a 17 page opinion.

Plaintiffs filed a petition for rehearing which was denied. The California

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[2] All parties were represented by counsel in the original partition action.

Supreme Court denied review. Finally, on April 3, 1989, the United States Supreme Court denied their Petition for a Writ of Certiorari.

On April 2, 1990, Plaintiffs, appearing in propria persona, filed the instant action. The crux of the claim is that allowing a party attorney to prepare a draft Statement of Decision constitutes improper relinquishment of judicial power. Moreover, they argue, as applied to them Stoen's preparation of the statement and the judge's "total" acceptance of it, denied them their right to a fair trial as guaranteed under the fifth and fourteenth amendments, creating a cause of action under 42 U.S.C. § 1983. The appellate court's reliance on this statement of facts allegedly caused an erroneous decision again denying Plaintiffs' their constitutional rights. They also complain that the appellate process of review, including the

Court of Appeal's standard of review denied them a fair and non-capricious hearing. Plaintiffs argue that Cal. Code Civ. Pro. § 632 is unconstitutional and request a declaration of such. Finally they argue that Defendants Stoen, Brady, and the Becktolds have violated Plaintiffs' rights under the California Constitution and are guilty of conversion, trespass, and intentional infliction of emotional distress in relation to the partition of the property.

ANALYSIS

The claims outstanding against the moving defendants, the Superior Court and the Court of Appeals, are abuse of judicial process resulting in violations of 42 U.S.C. § 1983, and violations of state constitutional rights.[3] Although Defen-

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[3] In the original complaint, Plaintiffs address their state law tort claims to the "defendants." However, in a letter to the attorney for the Superior Court, Wonderwheel states that he did not intend to include the courts as defendants to these claims. Since Wonderwheel included this (continued...)

dants proffered a number of defenses to Plaintiffs' claims, this Court finds that the statute of limitations bars the complaint and therefore declines to rule on the merits of the case.

A. LEGAL STANDARD

In enacting 42 U.S.C. § 1983, Congress did not specify a statute of limitations. Instead, the federal courts were to apply local statutes of limitation when adjudicating § 1983 claims. In Wilson v. Garcia, 471 U.S. 261, 279 (1985), the U.S. Supreme court held the courts should adopt the local statute of limitations for personal injury claims. In California, this is one year. Cal. Code. Civ. Pro. § 340(3). As well, the courts should apply local law and custom governing tolling of the statute of limitations. Harding v. Galceran, 889 F.2d

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[3](...continued)
letter as an exhibit to his opposition, this Court holds Plaintiffs to that configuration of claims and defendants.

906, 907 (9th Cir. 1989); Ervin v. Los Angeles County, 848 F.2d 1018, 1019 (9th Cir. 1987).

B. ANALYSIS

1. Statute of Limitations

Plaintiffs' § 1983 claims concern the Superior Court trial and the appeal to the Court of Appeals. There are no allegations in the complaint of injurious conduct occurring after Defendant Court of Appeals denied rehearing. Construing the complaint liberally, Plaintiffs' § 1983 cause of action accrued on or before September 16, 1988.[4] The instant action was not filed until April 2, 1990. Thus, no matter how the complaint is interpreted, Plaintiffs' § 1983 claim was brought more than one year after the cause of action accrued.

Although Plaintiffs admit that they did not file the present action until more

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[4] Plaintiffs agree that their cause of action accrued as early as October 30, 1986.

than one year after their § 1983 causes of action accrued, they argue that the statute of limitations was equitably tolled while they pursued their numerous appeals. This period, they argue, ended on April 3, 1989 when the U.S. Supreme Court denied their petition for certiorari. If this argument were to prevail, then the filing of this action on April 2, 1990 would not be time-barred.

State doctrines governing the tolling of applicable statutes of limitation govern the federal courts hearing § 1983 actions. The California courts have created a doctrine of equitable tolling that covers situations where a litigant has first sought relief through other channels. See Ervin v. Los Angeles County, 848 F.2d 1018, 1019 (9th Cir. 1987); Donoghue v. Orange County, 848 F.2d 926, 930 (9th Cir. 1987); Myers v. County of Orange, 6 Cal.App.3d 626, 86 Cal.Rptr. 198 (1970).

In order to toll the statute of limitations, a plaintiff must pass a three-pronged test. The test requires-that: 1) the defendant receive timely notice of the claims; 2) the delay not prejudice the defendant, especially in the gathering of evidence and witnesses; and 3) the plaintiff has acted reasonably and in good faith in filing the second, time-barred claim. Ervin v. Los Angeles County, 848 F.2d 1018, 1019 (9th Cir. 1987); Donoghue v. Orange County, 848 F.2d 926, 931 (9th Cir. 1987).

This Court holds that Plaintiffs' assertions of tolling do not pass this test. Plaintiffs' appeals to the California Supreme Court and the U.S. Supreme Court gave insufficient notice to the Defendants that they would be subject to a suit in Federal District Court. Plaintiffs assert that their "petitions on appeal were timely filed and clearly informed defendants of plaintiffs' constitutional claims

and determination to achieve justice." Plaintiffs' opposition to Superior Court motion at 19. It may be true that the "Defendants" were informed of plaintiffs' desire for justice. However, a reasonable person would assume once the U.S. Supreme Court has denied a litigant's petition for certiorari, that the denial will be the end of a long and protracted legal battle and not the beginning of anew one. Moreover, the judicial Defendants were not parties to the original suit and its subsequent appeals. Thus, to say that Plaintiffs' journey through the appellate process put the Superior Court and the Court of Appeals on notice of a potential cause of action against them is unfounded.

Moreover, it is of arguable good faith to engage in this lawsuit. Plaintiffs had their day in court and yet are now suing the very judges who gave them that day in court. Plaintiffs have also not explained

how the filing of this second suit is reasonable conduct, beyond making conclusory statements that it is. Therefore, the Court holds does not [sic] come to the level of good faith and reasonable conduct required by the California doctrine of equitable tolling.

2. Sanctions

Defendant Court of Appeals has requested sanctions pursuant to Fed. R. Civ. P. Rule 11. Rule 11 mandates the imposition of sanctions: 1) when the pleading has been interposed for an improper purpose; or 2) where after reasonable inquiry, an attorney could not form a reasonable belief that the pleading was well grounded in fact and legally tenable. Cooter & Gel v. Hartmarx, ___ U.S. ___, 110 S.Ct. 2447, 2454 (1990). Although it is argued in the context of equitable tolling that the filing of this suit is of questionable good faith, Plaintiffs' conduct does not warrant impo-

sition of sanctions. Plaintiffs make a number of plausible, if not winning arguments that are supported with case law. Therefore the Court does not find a violation of Rule 11.

Accordingly, and good cause showing, IT IS HEREBY ORDERED that the motion to dismiss by Defendants Superior Court of Mendocino and California Court of Appeal is GRANTED and the claims against these Defendants are DISMISSED. IT IS SO ORDERED.

Dated: July 30, 1990

/s/THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION
AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 42 UNITED STATES CODE

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United

States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action o r proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12. DEFENSES AND OBJECTIONS--WHEN AND HOW PRESENTED--BY PLEADING OR MOTION--MOTION FOR JUDGMENT ON THE PLEADINGS

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (6) failure to state a claim upon which relief can be

granted, (7) ...

Rule 52. FINDINGS BY THE COURT

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 632. [Statement of Decision]

In superior, municipal, and justice courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for

its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to the submission of the matter for decision. The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. After a party has requested such a statement, any party may make proposals as to the content of the statement of decision.

The statement of decision shall be in writing, unless the parties appearing at trial agree otherwise; however, when the trial is concluded within one calendar day or in less than 8 hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties.

§ 909. [Findings of fact on appeal in nonjury cases: Taking additional evidence: Giving or directing entry of judgment or order: Construction]

In all cases where trial by jury is not a matter of right or where trial by jury has been waived, the reviewing court may make findings of fact contrary to or in addition to those made by the trial court. Such findings may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court. The reviewing court may for the purpose of making such findings of fact or for any other purpose in the interests of justice, take additional evidence of or

concerning facts occurring at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make such further or other order as the case may require. This section shall be liberally construed to the end among others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court except where in the interests of justice a new trial is required on some or all of the issues.

CALIFORNIA RULES OF COURT

Rule 23. Findings and additional evidence on appeal

(a) [Request for findings] A request that the reviewing court make findings of fact shall contain a draft of the proposed findings, and may be made in a brief, or a separate application may be served and filed. If opposing counsel has not had an opportunity in his brief to object to the request, he may serve and file written opposition thereto.

(b) [Application to produce evidence] Proceedings for the production of additional evidence on appeal shall be in accordance with rule 41. The court may grant or deny the application in whole or in part, and subject to such conditions as it may deem proper. If the application is granted, the court, by appropriate order, shall direct that the evidence be taken before the court or a department or a justice thereof, or before a referee appointed for the purpose. The court shall also prescribe reasonable notice of the time and place for the taking of the evidence and shall indicate the issues on which the evidence is to be taken. Where documentary

evidence is offered, either party may submit the original or a certified or photostatic copy thereof and the court may admit the document in evidence and add it to the record on appeal.

PROOF OF SERVICE BY MAIL

I declare under penalty of perjury that: I am over the age of 18 years and not a party to the within entitled cause; my business address is 131 Stony Circle, Suite 1600, Santa Rosa, California 95401; on August 16, 1991, I served the attached

PETITION FOR WRIT OF *CERTIORARI*

on all parties to this cause by mailing three (3) copies thereof by first class mail, postage prepaid, addressed to their attorneys, as follows:

Timothy O. Stoen
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_____
Carol Spooner